United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

ORIGINAL

75-7402

To be argued by
MICHAEL J. CARCICH

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

KOOPERATIVA FORBUNDET, STOCKHOLM,

Plaintiff-Appellant,

against

VAASA LINE OY, PARTENREEDEREI M.S. "URSULA JACOB" and the S.S. URSULA JACOB, her engines, her boilers, etc.,

Defendants-Appellees.

BRIEF FOR DEFENDANT-APPELLEE PARTENREEDEREI M.S. "URSULA JACOB"

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Statement

This is an appeal from two orders of the District Court for the Southern District of New York, the first vacating the default judgment against defendant-appellee Vaasa Line Oy, and the second dismissing the complaint against all defendants on the ground of *forum non conveniens*. This brief will deal only with the order dismissing the complaint.

The sequence of events has been recited in the opinion, and again in the appellant's brief; no useful purpose would be served by further repetition. We should note in passing, however, that defendant-appellee Partenreederei M.S. "Ursula Jacob", the ship owner herein, denies it is a party to the bills of lading issued by defendant-appellee Vaasa Line Oy, or that they were signed by the master as stated in appellant's brief. Defendant-appellee also denies that there was any damage found on discharge of the coffee. Neither of these contentions has been established and ultimate liability, if any, may well turn on findings of fact which can only be made after a trial.

POINT I

The order dismissing this action on the grounds of *forum non conveniens* was a proper exercise of the District Court's discretion.

Plaintiff-appellant's brief dwells heavily on what it claims are the contacts of the case with this jurisdiction. However, the District Court considered these same contacts, and decided that the balance of convenience indicated that this case should not proceed in the Southern District of New York.

This ruling was an exercise of discretion on the part of the District Court. *Charter Shipping Co.* v. *Bowring*, 281 U.S. 515, 517. What plaintiff-appellant asks this Court to do, is to substitute its own discretion for that of the District Court. However, that cannot be the standard for review here. This Court need only consider whether the District Court has abused its discretion. *Charter Shipping Co.* v. *Bowring, supra; Fitzgerald* v. *Texaco, Inc.*, not yet reported, Docket Nos. 74-1958 and 74-1468 (2nd Cir., June 25, 1975), slip opinion page 4375 at 4379.

There was no abuse of discretion. The shipment was moving from Costa Rica to Stockholm via Helsinki. It was shipped by a Costa Rican corporation and consigned to a Swedish corporation. The carrying vessel was owned by a West German company and had been chartered to a Finnish corporation which issued the bills of lading. The ship never called at New York, or any other U. S. port after loading the cargo in Costa Rica. It proceeded directly to Helsinki, Finland. All witnesses to the loading of the cargo are in Costa Rica. All witnesses to the discharge are in Finland and Sweden. The vessel has been sold, and the crew, if it can be found anywhere, would most likely be in West Germany. There is no one in New York who even saw this cargo. Significantly, plaintiff-appellant itself states at page 15 of its brief that:

> "The damages were ascertained by Plaintiff's surveyor and salvage effected by Plaintiff's salvor."

It does not add, as it should, that defendants also had a surveyor inspect this coffee and that all these witnesses are in Sweden, where allegedly, the coffee was found to be damaged and was salvaged.

The only contact the plaintiff-appellant claims with New York is that the bills of lading were negotiated

through a New York bank. As the District Court correctly pointed out, however,

> ". . . these events would be irrelevant to the question of liability for the water damage." (96a).

Plaintiff-appellant argues at page 19 of its brief that it has a right to expect U.S. law to apply to this action, and that it does not know if a foreign court would apply that law. However, the District Court has already ruled that U.S. law would not apply (99a). Thus, over and above the inconvenience to the parties of trying this case in the Southern District of New York, the parties would have the additional burden of proving foreign law.

POINT II

The bill of lading forum selection clause mandates that this action be dismissed.

On the above facts alone, dismissal on the grounds of *forum non conveniens* was clearly not an abuse of discretion by the District Court. However, in addition to these compelling reasons for dismissal, the District Court also endorsed the forum selection clause in the bill of lading, although finding it unnecessary to be applied.

The standards for construing a forum selection clause in an international contract were clearly set forth in the landmark case of *Bremen* v. *Zapata Off-Shore Co.*, 407 U.S. 1.

> ". . . such clauses are prima facie valid and should be enforced unless enforcement is shown by the resisting party to be unreasonable under the circumstances." 407 U.S. 1, 10.

The burden then is placed on plaintiff-appellant to come forward with reasons why the forum clause should not be enforced. That burden is an extremely heavy one, re-

quiring not only a showing that the balance of convenience favors the plaintiff's choice of forum, but further, that trial elsewhere would effectively deprive the plaintiff of its day in Court. *Bremen,* 407 U.S. 1, 19.

Instead of trying to carry that burden, plaintiff-appellant merely made nit-picking objections to the bill of lading contract. It first claimed that it was a contract of adhesion; i.e., that the carrier had overwhelming bargaining power, and that the shipper had no real opportunity to discover the clause, allegedly buried in boilerplate. But the shipper was no babe in the woods. This shipment amounted to 5,000 bags of coffee (27a, 29a, 31a), and the shipper was a regular supplier of coffee to overseas buyers (16a), not someone lacking familiarity with bills of lading. In any event, forum selection clauses in bills of lading have been enforced. *Fireman's Fund American Insurance Co.* v. *Puerto Rican For. Co., Inc.,* 492 F. 2d 1294 (1st Cir., 1974); *Roach* v. *Hapag-Lloyd,* 358 F. Supp. 481 (N.D. Cal., 1973).

Plaintiff-appellant's second complaint is that the clause is vague, since it only refers to the "principal place of business of the carrier". This charge is baseless. The bill of lading clearly identifies Vaasa Line Oy as the carrier, and states its address as Helsinki 10, Finland (27a).

Plaintiff-appellant's third complaint is that the clause should not be enforced because it relegates the plaintiff to a forum where U.S. law would not apply. However, plaintiff is not a U.S. citizen, and as the District Court correctly pointed out, U.S. law would not be applicable to this case even if it was tried here (99a). Even if the plaintiff were an American citizen, this would be no basis for refusing to enforce the forum selection clause. As the Supreme Court stated in *Bremen, supra:*

> "The expansion of American business and industry will hardly be encouraged if, notwithstanding solemn contracts, we insist on a parochial concept that all dis-

putes must be resolved under our laws and in our courts." 407 U.S. 1, 9.

See also: *Fitzgerald* v. *Texaco, Inc.*, not yet reported, Docket Nos. 74-1958 and 74-1468 (2nd Cir., June 25, 1975) concurring opinion of Judge Mansfield, slip opinion p. 4375 at 4394 a.

Plaintiff's final argument is that the forum clause cannot be enforced because of the *in rem* character of the case. The short answer is that *Bremen, supra,* was also an *in rem* case.

Plaintiff-appellant, it should be noted, has not lost any of its rights to pursue its *in rem* action in the courts of Finland. The District Court imposed a condition on its dismissal, that the shipowner deposit a bond in Finland equal to the one in this action and incorporating the same terms and conditions (100a-101a). Thus, plaintiff-appellant's rights are adequately protected. *Garis* v. *Compania Maritima San Basilio, S.A.*, 261 F. Supp. 917 (S.D.N.Y., 1966), aff'd, 386 F. 2d 155 (2nd Cir. 1967).

CONCLUSION

The facts clearly show that dismissal by the District Court on the grounds of *forum non conveniens* was not an abuse of discretion. The ruling below should be affirmed.

Respectfully submitted,

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Defendants-Appellees.

State of New York,
County of New York,
City of New York—ss.:

DAVID F. WILSON being duly sworn, deposes and says that he is over the age of 18 years. That on the 21st day of November, 1975, he served two copies of the Brief for Appellee Partenreederei on John P. D'Ambrosio, P.C.

the attorney for the Appellant by depositing the same, properly enclosed in a securely sealed post-paid wrapper, in a Branch Post Office regularly maintained by the Government of the United States at 90 Church Street, Borough of Manhattan, City of New York, directed to said attorney at No. Honeywell Center, 570 Taxter Road, Elmsford, New York ( ) N. Y., that being the address designated by him for that purpose upon the preceding papers in this action.

David F. Wilson

Sworn to before me this
21st day of November, 1975.

Courtney J. Brown

COURTNEY J. BROWN
Notary Public, State of New York
No. 31-5472020
Qualified in New York County
Commission Expires March 30, 1976

Due and timely service of Two copies
of the within Brief is hereby
admitted this 21st day of November 197 5

Attorney for APPELLEE VAASA LINE OY

by T. DeLaney